

BEFORE LINDA McCULLOCH, SUPERINTENDENT OF PUBLIC INSTRUCTION
STATE OF MONTANA

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KEVIN HARPER and PAULA HARPER,)	
On behalf of their son KODY HARPER,)	OSPI 298-04
)	
Petitioners,)	
)	
-vs-)	DECISION AND ORDER
)	
BOARD OF TRUSTEES of SHEPHERD)	
SCHOOL DISTRICT NO. 37,)	
)	
Respondent.		

* * * * *

Having reviewed the record and considered the parties' briefs, the Superintendent of Public Instruction issues the following Decision and Order.

DECISION AND ORDER

The September 7, 2004 Order on Motion to Dismiss by the Yellowstone County Superintendent of Schools denying jurisdiction in this matter and Granting Respondent's Motion to Dismiss is hereby GRANTED in part and REVERSED in part and remanded to the County Superintendent for hearing.

PROCEDURAL HISTORY

This is an appeal by Kevin and Paula Harper on behalf of their son, Kody Harper (hereinafter "Harpers") of the Order on Motion to Dismiss dated September 7, 2004 issued by the Yellowstone

County Superintendent of Schools.

Respondent, the Board of Trustees of Shepherd School District No. 37 (hereinafter "District") issued a decision on June 9, 2004 upholding disciplinary penalties previously imposed on Kody Harper. Harpers appealed the District's decision to the Yellowstone County Superintendent of Schools. The District filed a Motion to Dismiss alleging that there was no contested case, the appeal was untimely and the letter/notice of appeal did not strictly comply with the form prescribed by administrative rule. On September 7, 2004, the Yellowstone County Superintendent held that the service and form of the appeal were adequate but that there was no contested case and therefore granted the Motion to Dismiss and dismissed the appeal. Harpers have appealed that decision.

The Yellowstone County Superintendent of Schools' Order on Motion to Dismiss dated September 7, 2004 is the subject of this appeal.

ISSUE ON APPEAL

The issue on appeal is: Does the Yellowstone County Superintendent of Schools have jurisdiction to hear Harpers' appeal of the District's decision to uphold the disciplinary action imposed on Kody Harper?

STANDARD OF REVIEW

The State Superintendent's review of a county superintendent's decision is based on the standard of review of administrative decisions established by the Montana Legislature in Mont. Code Ann. §2-4-704 and adopted by the State Superintendent in Admin. R. Mont. 10.6.125. Findings of fact are reviewed under a clearly erroneous standard and conclusions of law are reviewed to determine if the correct standard of law was applied. *Harris v. Trustees, Cascade County School Districts No. 6 and F, and Nancy Keenan*, 241 Mont. 274, 277, 786 P.2d 1164,

1166 (1990) and *Steer, Inc. v. Dept. of Revenue*, 245 Mont. 470, at 474, 803 P.2d 601, 603 (1990).

The State Superintendent may reverse or modify the county superintendent's decision if substantial rights of the Appellant have been prejudiced because the findings of fact, conclusions of law and order are (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (g) affected because findings of fact upon issues essential to the decision were not made although requested. Admin. R. Mont. 10.6.125(4).

FINDINGS OF FACT

1. Kody Harper was a member of the Shepherd School golf team during the spring of 2004 and was one of several students representing the District at the state golf tournament in Shelby, Montana.

2. The District golf team stayed at a motel in Conrad during the tournament. Kody and four other students on the golf team were out after curfew. During that time a bag containing feces was placed on the porch of a Conrad residence and lit on fire. Alcohol and tobacco were also used by two of the students involved.

3. Kody was cited for being out after curfew by the Conrad police. He was not cited for alcohol or tobacco violations.

4. The District imposed sanctions on all of the boys. Kody received a 45 day suspension from extra-curricular activities for illegal activity under school supervision. He was also directed to return his varsity letter for the 2004 golf season and was directed to write letters of

apology to the District and the Conrad family.

5. Harpers filed a grievance with the District regarding the District's revocation of Kody's letter in golf. The District upheld the discipline imposed by the school administration including revocation of the letter.

6. Harpers filed an appeal with the County Superintendent on July 6, 2004.

7. The County Superintendent dismissed the appeal based on lack of jurisdiction after finding that this matter did not constitute a contested case under administrative law.

8. Harpers have appealed the County Superintendent's decision to the State Superintendent of Public Instruction.

CONCLUSIONS OF LAW

Does the Yellowstone County Superintendent of Schools have jurisdiction to hear Harpers' appeal of the District's decision to uphold the disciplinary action imposed on Kody Harper?

The State Superintendent concurs with the County Superintendent's determination that the service and form of the appeal are not strictly in compliance with administrative rule.

Administrative rule 10.6.105 provides in relevant part:

(4) Failure of any party to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal but is grounds for such action as the county superintendent deems appropriate, which may include dismissal of the appeal.

The evidence shows that the appeal was timely filed with the County Superintendent. The County Superintendent determined that the irregularities in the letter of appeal and failure to serve the same on the District within the 30 days were not sufficient grounds for dismissal of the

appeal. The State Superintendent concludes that this decision was within the County Superintendent's legal authority under ARM 10.6.105 and affirms the same.

The second issue on determination of jurisdiction involves whether or not the Harpers case is a "contested case" under Montana law. Montana administrative rule defines "contested case" as "any proceeding in which a determination of legal rights, duties or privileges of a party is required by law to be made after an opportunity for hearing." ARM 10.6.102 The State Superintendent held in *Schultz v. Arlee School District #8-J*, OSPI 256-95 that "for a County Superintendent to have jurisdiction to hold a hearing a petitioner must have a constitutional, statutory or case law grant of a hearing right."

The Montana Supreme Court has clearly held that while participation in extra-curricular activities is not a fundamental right it is a right that is subject to constitutional protection. *State ex rel. Bartmess v. Board of Trustees of School District 1*, (1986) 223 Mont. 269, 275, 726 P.2d 801,805.

Kody was entitled to and did receive due process before his right to participate in extra-curricular activities was suspended for 45 days. Harpers challenge whether or not the District properly applied the policies it had established in the student handbook in their determination of punishment for Kody. Because Kody's right to participate in extra-curricular activities is subject to constitutional protection, this is a contested case and the County Superintendent has the jurisdiction to hold a hearing to determine if Kody's right to participate was violated by misapplying the District's policies.

Kody does not, however, have a constitutional right to a hearing in connection with receiving or the revocation of his letter in golf. Receiving a particular award for participation in extra-curricular activities is not a right protected by the constitution, state statute or case law and

therefore is not an issue that is subject to the jurisdiction of the County Superintendent.

Respondent has also alleged that this matter is now moot because the 45 day suspension has been served. While it is true that Kody has served the 45 day suspension, it is also true that a similar situation could happen before he graduates from high school and that the record of the suspension could be removed from his permanent school record. In determining mootness the Montana Supreme Court uses the "capable of repetition, yet evading review" doctrine. *School District No. 4 Forsyth v. Board of Personnel Appeals*, 214 Mont. 361, 692 P.2d 1261.

"This doctrine is limited to a situation where two elements are combined: (1) the challenged action was in its duration too short to be fully litigated prior to the cessation or expiration; and (2) there was a reasonable expectation the same complaining party would be subjected to the same action again." *School District No. 4 Forsyth v. Board of Personnel Appeals*, *supra*, at 1262.

It is apparent that the challenged suspension was too short for this matter to be fully resolved prior to its expiration and that there is a reasonable expectation that Kody could be subject to the same action during his remaining two and a half years of high school. Therefore the State Superintendent finds that this case is not moot and should be heard on its merits.

The State Superintendent reverses the County Superintendent's Order Dismissing the Appeal and remands this case for hearing before the County Superintendent to determine if the District's policies were misapplied which resulted in a violation of Kody's right to participate in extra-curricular activities.

DECISION AND ORDER

The September 7, 2004 Order on Motion to Dismiss by the Yellowstone County Superintendent of Schools denying jurisdiction in this matter and Granting Respondent's Motion to Dismiss is hereby GRANTED in part and REVERSED in part and remanded to the County

Superintendent for hearing.

DATED this 15th day of March, 2005.

/s/ Linda McCulloch
Linda McCulloch,
State Superintendent of Public Instruction

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 15th day of March, 2005, a true and exact copy of the foregoing DECISION AND ORDER was mailed, postage prepaid, to the following:

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